United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2204

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

NO. 74-2204

JOHN GANGEMI, ET AL.,

APPELLANTS,

vs.

SALVATORE SCLAFANI, ETC., ET AL.,

APPELLEES

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
NEW YORK

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN UPHOLDING THE ABRIDGEMENT OF APPELLANTS' RIGHT OF ACCESS TO THE BALLOT WITHOUT ADVANCING A COMPELLING STATE INTEREST BY THE LEAST DRASTIC MEANS

II. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE COURT OF APPEALS IN CREATING A NEW RULE OF LAW IN LUTFY V. GANGEMI, WITHOUT REMANDING THE CASE FOR FURTHER HEARING, DID NOT ESTABLISH A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

III. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BOARD OF ELECTIONS DID NOT HAVE TO COMPLY WITH THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973 c, BEFORE INSTITUTING A CHANGE IN PROCEDURE WITH RESPECT TO VOTING DIFFERENT FROM THAT IN FORCE OR EFFECT PRIOR TO NOVEMBER 1, 1964

STATEMENT OF THE CASE

A designating petition was timely filed for Plaintiff-Appellants (hereinafter referred to as "appellants") JOHN F. GANGEMI and JENNIE DI CARLO for the purpose of placing their names on the ballot for the offices of Male and Female members of the Republican State Committee for the 49th Assembly District, Kings County, State of New York for the primary election to be held on September 10, 1974.

Members of the State Committee are party positions which are representative of an entire Assembly District. The Election Law requires a maximum of 500 signatures of enrolled Republicans residing in the Assembly District.

The 49th Assembly District contains 75 election districts which are the smallest units of representation. Enrolled Republicans in each of these election districts are entitled to elect two or more County Committeemen from such district, depending on the Republican vote for Governor in the preceding Gubernatorial election. Candidates are designated for nomination to County Committee by filing designating petitions containing varying numbers of signatures for each district.

Candidates for County Committee are not required to reside in the election district in which they are candidates, but

are merely required to reside within the boundaries of the Assembly District. When elected they are considered county committeemen representing the entire Assembly District.

On the same petition sheets circulated for the candidacies of GANGEMI and DI CARLO as State-Committeemen, there were designated various candidates for County Committee from the various election districts.

Mr. Gangemi was designated as a candidate for County Committee in twenty-five election districts out of seventy-five, and like the other candidates for County Committee, such designations were on petition sheets also containing the designation of Gangemi for State Committee. The entire petition designating Gangemi as State Committeeman contained 2,287 signatures. The petition pages naming Gangemi as designee for County Committee in the 25 Election districts contained 744 signatures. There thus remain 1,543 signatures designating Gangemi for State Committee, on petition sheets which did not bear his name as a designee for County Committee. These remaining signatures are concededly valid, and are more than triple the number required for the designation of Gangemi as State Committeeman. These signatures are therefore unaffected by the multiple candidacies of Gangemi for County Committee. Certain other persons were also designated as

County Committee in more than one election district.

The Board of Elections, in an administrative proceeding prior to the institution of any proceeding in New York Supreme Court, invalidated all the multiple candidacies for County Committee for all but one election district per person, while leaving all the remaining candidacies, including those of appellants for State Committee, intact.

Edward R. Lutfy, Rose A. Archbald, and Eugene Gibilaro then brought a proceeding in New York Supreme Court, Kings County, to invalidate the entire petition, including the designation therein of appellant JOHN F. GANGEMI as State Committee male, and JENNIE DI CARLO as State Committee female. That State proceeding was brought under Index No. 12021/74, and a hearing was held at a Special Term for election matters, Mr. Justice Heller, presiding.

At the hearing, appellees called two witnesses. The substance of their testimony and the substance of a stipulation as to what other witnesses would testify to is as follows:

That appellant Gangemi approached each prospective candidate for County Committee; that he obtained consent for each to run in an election district together with him as candidates for County Committee, and that appellant Gangemi was

also a candidate for the State Committee. In all instances the Subscribing Witnesses offered each signatory an opportunity to read the entire slate of candidates contained on the petition and that in soliciting the signatures the subscribing witnesses furnished to the signees of these petitions a campaign circular which stated: "JOHN F. GANGEMI for District Leader" and JENNIE DI CARLO for Co-Leader," and nowhere made any reference to their candidacies for County Committee.

The completed petition sheets were returned to one Joseph Grancio, a law partner to Mr. Gangemi, or his agents.

No testimonial or other evidence was submitted at the hearing to show that the designation of appellant Gangemi or of any other appellant as County Committeeman in the various election district's was intended to or did in fact induce any signatory to sign the petitions for JOHN F. GANGEMI'S or JENNIE DI CARLO'S candidacies for State Committee.

There was no evidence that the candidacies of any of the appellants was intended to misrepresent, nor that said candidacies for County Committee in the various election districts was anything but an effort to get elected in one election district.

There is no evidence of any kind as to whether the

signatories upon signing the petition relied on any of the County Committee designations thereon as opposed to the State Committee designations.

There was no evidence that appellant Gangemi prepared or caused to be prepared the designating petitions.

There was no evidence that the signatories to the "Gangemi Petition" were advised that Gangemi was a candidate for County Committee in their respective Election Districts, although it was stipulated that each signatory was given the opportunity to read the entire designating petition.

There is no evidence that Gangemi is well experienced in election law litigation.

There is no evidence that signatories to the petition were "fraudulently induced" to believe Gangemi would be their County Committeeman. (This indeed is one of the allegations which was required to have been proven at the trial, and concerning which no testimony was adduced.)

There was no evidence introduced that you could not run in more than one Election District to be elected as a County Committeeman for the entire Assembly District.

The Court at Supreme Court, Special Term, denied the application to invalidate the entire petition and dismissed the proceeding. See page 50 in Appendix hereto.

The appellants appealed to the Appellate Division of the Supreme Court of the State of New York, 2d. Department, where the judgment of the Supreme Court was affirmed, on the opinion of the Special Term, Justices Shapiro and Benjamin. See page 49 in Appendix hereto.

The appellants then appealed to the Court of Appeals of the State of New York, which reversed the decision of the Appellate Division, and invalidated, as a matter of law, the entire designating petition, including the designations of Gangemi and Di Carlo as State Committeemen and invalidating the designations of all County Committee candidates, regardless of whether they were or were not candidates for multiple incompatible offices. The Court of Appeals did not remand for the purpose of establishing any additional facts. See page 47 Appendix hereto.

The appellants then brought an action in United States District Court, Eastern District of New York, seeking a temporary restraining order and preliminary and permanent injunction to restrain appellees and their agents from removing the appellants' names from the ballot in the election which was to be held on September 10, 1974, for Republican party office.

In this action which was commenced on September 3, 1974, appellants contended that the appellees in taking

steps to remove their names from the ballot violated their rights as guaranteed to them under the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States and under the Voting Rights Act of 1965, 42 U.S.C. §1973 c. The parties had agreed that neither the Constitutional nor Federal Statutory issues raised for the first time in United States District Court were considered by either the New York Court of Appeals nor any of the lower state courts. The United States District Court assumed jurisdiction since the court was informed by the Clerk of the Court of Appeals that the Court of Appeals was not in a position to entertain an application for reargument prior to the election of September 10, 1974. Therefore, the United States District Court considered the merits of the complaint and on September 4, 1974, the Honorable Jack B. Weinstein denied the relief sought by the appellants and dismissed the action.

A notice of appeal was then filed on September 9, 1974, and this Court then granted motion for expedition.

ARGUMENT I

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN UPHOLDING THE ABRIDGEMENT OF APPELLANTS' RIGHT OF ACCESS TO THE BALLOT WITHOUT ADVANCING A COMPELLING STATE INTEREST BY THE LEAST DRASTIC MEANS.

A. The New York Election Law as interpreted by the New York Court of Appeals in Lutfy v. Gangemi. (N. Y. - 1974).

The New York Election Law, pursuant to judicial interpretation,[1] prohibits a candidate from running for more than one party office where the holding of such multiple offices would be incompatible. In Ryan v. Murray, 172 Misc. 105, 14 N.Y.S. 2d 539 (1939) aff'd 257 App. Div. 1068, 14 N.Y.S. 2d 541 (1st Dept. 1939) the New York courts attempted to define the concept of electoral incompatibility "and to articulate the prohibition against 'multiple-incompatible candidacies'" within the context of a challenge to a candidate who sought to be

1. It should be noted, as the cases readily concede, the prohibition against running for incompatible offices is not explicitly forbidden by any provision within the Election Law. Rather, the prohibition has been fashioned by the case law and is said to derive from the "spirit and intent of the Election Law." See Burns v. Wiltse, 303 N.Y. 319, 323; Trongone v. O'Rourke 68 Misc. 2d 6, 324 N.Y.S. 2d, 620, 622 (1971).

elected as a county committeeman in twenty-three separate election districts. Accordingly, in the Ryan case, the Supreme Court reasoned supra at 541 that because a county committeeman "would be entitled to cast only one vote as a member of the County Committee," consequently he can, effectively, "only serve as a County Committeeman for one specific District." The Court in Ryan therefore concluded that the offices of county committeeman from different Election Districts are incompatible offices and that a candidate may not seek election as a county committeeman from more than one Election District. In accord with this interpretation was the more recent case of Trongone v. O'Rourke, 68 Misc. 2d 6, 324 N.Y.S. 2d 620 (1971) aff'd 37 A.D. 2d 763, 324 N.Y.S. 2d 295 (1st Dept. 1971).

In both the Ryan case and the Trongone case the judicial remedy which was employed, in order to cure the defect of multiple candidacies for incompatible offices, was to allow the Board of Elections to strike the designees' multiple petitions in all but one election district or to allow the designee to decline to run for office in all but one Election District. In either situation, under the Ryan and Trongone cases, a candidate, who initially filed multiple incompatible candidacies, was permitted to run in only one election district.

Such a remedy eliminated the defect of incompatible candidacies and yet had the virtue of permitting the office seeker to present his candidacy to the electorate.

Most recently, however, in the case of Lutfy v. Gangemi, supra, the New York Court of Appeals fashioned a new judicial remedy in order to resolve the problem of "multiple-incompatible candidacies." In Lutfy, when the Court of Appeals was confronted with a factual situation involving "multiple-incompatible candidacies," rather than permit the candidate to run in only one Election District, the Court completely invalidated all of the candidate's designating petitions, including three petitions where no incompatible candidacies existed, and thereby effectively prevented the candidate from running for any office at all.

Curiously, the Court of Appeals in the Lutfy case barred the prospective candidate not only from running for any office as a County Committeeman but from running for the office as a State Committeeman, as well. Yet, the office of State Committeeman is not incompatible with the office of County Committeeman. If the rationale of the Court of Appeals in Lutfy was that the candidate should be barred from running for County Committeeman because he filed multiple incompatible candidacies, there appears to be no reason why such a candidate should be barred from running for State Committeeman.

Judge Weinstein in his decision conceded that the trial court did not find that the petition was permeated with fraud. The trial court specifically held:

> ". . . it is the opinion of this Court that the petition here involved is not so permeated with fraud, as a result of the various candidacies of County Committeemen and Women, as to warrant its invalidation." (See page 13 of Appendix hereto.)

However, Judge Weinstein concluded that the Court of Appeals' decision was based on a ruling of law, that pervasive fraud had occurred.

Thus, the New York Election Law, as recently interpreted and applied by the New York Court of Appeals in Lutfy v. Gangemi punitively denies access to the ballot to any individual seeking the office of County Committeeman who erroneously files designating petitions as a candidate from more than one election district, and similarly denies such person access to the ballot as designee for any office, though such office is wholly compatible with any other incompatible offices contained in the same designating petition. Since striking John Gangemi's name from the candidacy of the position of State Committeeman left one remaining candidate

to run unopposed, the action by the Court of Appeals in the Lutfy case also punitively disenfranchised the Republican electorate from the 19th Assembly District from having a choice of candidates for the position of Republican State Committeeman.

B. The denial of access to the ballot can only survive constitutional scrutiny if it promotes a compelling state interest by the least drastic means.

1. The right of access to the ballot is an integral element of the fundamental right to vote.

It is well recognized that the substantive right to vote is the most fundamental of constitutional rights. The United States Supreme Court has described it as the right "preservative of all rights." Yick Wo. v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Accordingly, the right to vote is the assumption upon which the entire fabric of our political system is premised. Without the right to vote, freedom of speech and assembly would be relegated to meaningless anachronisms. Marcuso v. Taft, 476 F. 2d 187 (1st. Cir. 1973). It is not surprising, therefore, that the Federal Courts have explicitly recognized the right to vote as one of the "fundamental" rights, entitled to

plenary protection against state encroachment. As Chief Justice Warren, writing for the United States Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) stated at 377 U.S., 561-562:

> "Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

It is further recognized that the right to participate in a primary election is as protected against state encroachment as is the right to vote in the general election. E.g., Bullock v. Carter, 405 U.S. 134, 31 L. Ed. 2d 92, 92 S. Ct 849 (1972), Nixon v. Herndon, 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927); United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); Smith V. Allwright, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed 987 (1944); Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953). The federal courts have consistently observed that the right to vote may be rendered meaningless in the absence of a correlative right to participate in the partisan process by which candidates are selected. E.g. Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.) aff'd 400 U.S. 806, 27 L. Ed. 2d 38, 915 S. Ct. 65 (1970).

Accordingly, in Williams v. Rhodes, 393 U.S. 23, 21 L.Ed. 2d 24, 89 S.Ct. 5 (1968) the United States Supreme Court has also explicitly held that the right to appear on the ballot is similarly an integral element of the fundamental right to vote and must be measured by the same constitutional test that is applied to any substantial abridgement of the franchise.

2. State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means

The United States Supreme Court has imposed a rigorous standard in measuring the constitutionality of state action which restricts the franchise. Thus, in order to justify a classification or requirement which effectively denies access to the ballot, a state must demonstrate that the requirement involved advances a compelling state interest by the least drastic means. Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct. 995 (1972); Kusper v. Pontikes, ___ U.S. _____, 38 L.Ed. 2d 260, 94 S.Ct. ___ (1973).

Traditionally governmental classifications challenged as violative of the Equal Protection Clause of the Fourteenth Amendment were sustained if they were rationally related to the advancement of a legitimate state interest. E.g., McGowan

v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). However, two major exceptions to the permissive "rational relationship" test have emerged in recent years. See, generally, Note, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065 (1969). If a governmental restriction purports to erect suspect classifications based upon such discredited criteria as race; or, if a state ruling is restrictive of the exercise of a "fundamental" right, this Court has employed a far more rigorous standard of review in determining its constitutionality. To pass scrutiny under the Equal Protection Clause, such a classification must not merely be rationally related to the advancement of a legitimate state interest, but must also be found necessary to advance a compelling state interest by the least drastic means possible. E.G., Skinner v. Oklahoma, 315 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); Memorial Hospital v. Maricopa County, _____ U.S. _____, 39 L. Ed. 2d 306, 94 S. Ct. _____ (1974).

Because, as noted above, the free exercise of the franchise and access to the ballot have been characterized as fundamental rights, the courts have consistently applied the "compelling state interest" test in evaluating the constitutionality

of governmental classifications restrictive of the franchise. See Carrington v. Rash, 380 U.S. 89, 13 L.Ed. 2d 675, 85 S.Ct. 775 (1965); Kramer v. Union Free School District, 395 U.S. 621 23 L.Ed. 2d 583, 89 S.Ct. 1886 (1969); Cipriano v. City of Houma, 395 U.S. 701, 85 S.Ct. 1897, 23 L.Ed. 2d 647 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204, 26 L.Ed. 2d 523, 90 S.Ct. 1990 (1970); Kusper v. Pontikes, supra; Dillenburg v. Kramer, 469 F. 2d 1222 (9th Cir. 1969).

In Dunn v. Blumstein, supra, Mr. Justice Marshall, writing for the court articulated this strict constitutional test, and reaffirmed the notions that the "compelling state interest" test imposes a "heavy burden of justification...on the State" and further that the governmental restriction of the franchise "will be closely scrutinized in light of its asserted purposes." Dunn v. Blumstein, supra at 343. In addition, however, Mr. Justice Marshall in Dunn, supra, demonstrated the dual aspects of the "compelling state interest" test. For such a test not only requires that the challenged classification promote a compelling state interest, but, secondly, that it advance such an interest by "the least drastic means." As Mr. Justice Marshall wrote, in Dunn, supra, at 343:

> "It is not sufficient for the State to show that durational residence requirements further a very susbstantial state interest. In pursuing that important

> interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,'" NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objective. Shapiro v. Thompson, supra, 394 U.S. at 631. And, if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

Thus, in order to survive constitutional scrutiny, appellees must demonstrate that the denial of appellants' access to the ballot promotes a compelling state interest by the least drastic means.

C. The interpretation of the New York Election Law, established by the New York Court of Appeals in Lutfy v. Gangemi, which denies appellants access to the ballot, fails to advance a compelling state interest by the least drastic means.

As noted supra Argument 1A, the New York Election Law, as recently interpreted and applied by the New York Court of Appeals in Lutfy v. Gangemi, punitively denies access to the ballot to any individual seeking the office of County Committeeman who erroneously files designating petitions as a candidate from more than one election district. Appellants concede that it is

reasonable to prohibit a candidate from running for more than one party office where the holding of such multiple offices would be incompatible. However, prior to the Lufty case, such a prohibition against "multiple-incompatible candidacies" was effectively enforced by having the Board of Elections strike the multiple candidacies or by allowing the candidate to decline to run for the additional offices and to thereby allow the candidate in question to run for one office only. See Ryan v. Murray, supra, and Trongone v. O'Rourke, supra. But in Lutfy v. Gangemi, supra, the New York Court of Appeals has read into the Election Law the sanction that any violation of the prohibition against "multiple-incompatible candidacies" will be enforced by barring the offending candidate from access to the ballot entirely, including candidacies for the party position of State Committee which are wholly compatible. There appears to be no compelling state interest which would justify such draconian sanctions.

More importantly, there are alternative, constitutionally less onerous means whereby defendants might effectively prevent "multiple-incompatible candidacies." First, as noted supra, prior to the recent decision in the Lutfy case, the accepted procedure for curing the defect created by a candidate seeking more than one "incompatible" office was to permit him to run for only one such office. See Ryan v. Murray, supra and Trongone v. O'Rourke, supra.

Such a remedy would be entirely suitable inasmuch as once the conflict of offices is resolved, the defect is no longer operative and the candidate should be permitted to run for the remaining office. The remedy of the Courts in Ryan and in Trongone is obviously much less drastic and therefore constitutionally less onerous. There is furthermore a second less drastic alternative to the complete denial of appellants' access to the ballot. Such an alternative would have been to strike all candidacies for incompatible offices, not permitting the candidate to run for any remaining incompatible office. In addition to curing the defect of incompatibility, such a remedy would advance the interest of the State even further by discouraging future designations for incompatible offices. Such a remedy is also less drastic in that it would permit appellants Gangemi and DiCarlo to run for the offices of State Committee.

There is in fact even a third alternate remedy less drastic than denying appellants complete access to the ballot. Such a remedy would have been not only to invalidate all the incompatible candidacies but, in addition, to invalidate all signatures on those sheets of the designating petitions which contained incompatible designations. It should again be noted that the designations of Gangemi for County Committee were contained within only a portion of the sheets of the entire petition, covering

25 out of a total of 75 election districts. The sheets in those 25 election districts contained 744 signatures out of a total of 2,287 signatures filed for State Committee in the entire Assembly District. That leaves 1,543 signatures for appellants' designations for State Committee which were completely unaffected in any way by the multiple incompatible designations for County Committee when only 500 signatures were necessary for designation of a candidate for Republican State Committee office. If appellants had known about the prohibition against incompatible candidacies, they could have discarded those sheets prior to filing the petition and still have qualified for the position of State Committee with more than three times the number of concededly valid signatures required for designation and 176 petition sheets out of 248 which did not contain any incompatible candidacies. Thus, the opinion of the Court of Appeals that the defect permeated the entire petition was unreasonable and its decision to invalidate the entire petition, including the designations for State Committee, was unnecessary and excessively drastic, particularly since the trial court did not find any permeation of fraud and since the Court of Appeals established a new ruling of law. This especially disposes of any argument that invalidation of the entire petition would discourage any future practice of designation for incompatible offices because

appellants here did not benefit in any way by such incompatible designations, in terms of their candidacies for State Committee. They filed 1,543 valid signatures totally unrelated to the incompatible designations. None of those signatories signed or were shown petition sheets with appellants' names designated as County Committee, and they therefore could not have relied on such designations as an inducement to sign the petition. Therefore, the invalidation of the State Committee designations, which were wholly compatible, could not in any way discourage the future practice of designation to incompatible offices, nor does it serve any compelling or indeed any legitimate state interest.

The defect described by the Court of Appeals must be inherent in the vary nature of incompatible designations,[2] and could attach only to the internal structure of that portion of the petition containing the seed of the defect; i.e., the incompatible designations for County Committee, which form the very basis for

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2. Argument II of the within Brief discusses the nature of the presumption advanced by the New York Court of Appeals in Lutfy, to the effect that the mere designation to incompatible offices leads to the conclusive assumption that the signatories to the designating petition were misled. It is, thus apparent that any deception inferred by the State Court arises as a matter of law through the operation of a presumption, and does not necessarily impugn the motives and intent of the appellants herein. There does not therefore exist fraudulent conduct in the traditional sense, which is supportive of the argument that the Court of Appeals imposed too drastic a remedy which was unconstitutionally punitive and not necessary or appropriate to advance a compelling state interest.

the defect. There exists no rationale or justification for extending that defect to any other portion of the petition. Certainly if there was such a necessity to take such drastic action then it would be incumbent upon the Legislature to prohibit such incompatible candidacies and to avoid the drastic measure which the Court of Appeals felt was necessary. There is no support in the record for Judge Weinstein's conclusion that appellants had persisted in the practice of running for incompatible candidacies, nor that this practice had been extensively engaged in for more than one-third of a century. See page 24 of Appendix hereto.

Inasmuch as there are less drastic means to satisfy the governmental interest in prohibiting "multiple incompatible candidacies," when the fundamental right to vote is at stake, the state has a constitutional obligation to employ these less onerous alternatives. Accordingly, the New York Election Law, to the extent that it punitively and completely denies access to the ballot to appellants who erroneously filed designating petitions as a candidate from more than one election district, is unconstitutional.

ARGUMENT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE COURT OF APPEALS IN CREATING A NEW RULE OF LAW IN LUTFY V. GANGEMI, WITHOUT REMANDING THE CASE FOR FURTHER HEARING, DID NOT ESTABLISH A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Concededly the Court of Appeals established a new rule of law (See page 19 of Appendix hereto) in the Lutfy v. Gangemi, supra, case in stating that the whole petition containing incompatible designations must be considered to be permeated with the defect. The Court so held without remanding for further consideration even though the trial court specifically found that the petition was not permeated with fraud and even though there are 1,543 signatures, and 176 out of 248 petition sheets, which did not contain and were not tainted by any incompatible candidacies.

As a result of the interpretation rendered by the New York Court of Appeals in the Lutfy v. Gangemi, supra, case, without remanding for hearing to determine whether appellants were guilty of fraud, it conclusively presumes that an individual who knowingly files designating petitions for multiple incompatible

candidacies is conclusively presumed, as a matter of law, to have acted in a manner intending to defraud the electorate. Such an individual is therefore conclusively presumed to be unfit for office and is consequently denied access to the ballot. That such a conclusive presumption has been established as a result of the Lutfy v. Gangemi, supra, case is apparent from a fair reading of the findings of fact in the trial court, and of the disposition and opinion rendered by the New York Court of Appeals in the Lutfy v. Gangemi, supra, case. In sum, there is nothing in the record of Lutfy v. Gangemi, supra, to suggest that the potential candidates actually intended to defraud the electorate by seeking to file petitions from more than one election district. Yet the Court of Appeals' decision in Lutfy v. Gangemi, supra, concluded as a matter of law that "multiplicity of inconsistent candidacies has been properly . . . described as fraudulent and deceptive..." (See pp. 47,48 of Appendix hereto) And the Court failed to remand to the trial court for a further evidentiary hearing on the issue of whether the potential candidates actually intended to perpetrate a fraud upon the electorate. These considerations irresistibly suggest that within the entire factual context of the Lutfy v. Gangemi, supra, case, the New York Court of Appeals has fashioned a conclusive presumption that as a matter of law an individual who knowingly files designating

petitions for multiple incompatible candidacies, intends to defraud the electorate and is unfit for office.

Supportive of the conclusive nature of the presumption in Lutfy v. Gangemi, supra, is the following language at page 2 of the opinion of the New York Court of Appeals:

> "With this practice, and absent acceptable excuse or justification, the voters who signed the offending petitions must be assumed to have been misled as to the candidates' intentions to serve as their representatives if designated and subsequently elected at the primary."

There is no possibility that appellant Gangemi could have rebutted the mandatory assumption that voters were misled. Despite the reference to an "acceptable excuse or justification," the presence of the incompatible designations on the petition sheets was an accomplished fact, the existence of which could not be extinguished by any possible excuse or justifications advanced by Gangemi. It is apparent that the New York Court of Appeals has assumed the signatories must have been misled by the mere presence of the names on the petition sheets, regardless of Gangemi's intent or excuses which could not have altered the presence of those names. Indeed, even if appellants Gangemi or Di Carlo had not known they had been designated as County Committee, and had not intended to thus be designated, neither their lack of intent to serve nor their ignorance could have changed the unalterable presumption

that ". . . the voters who signed the offending petitions must be assumed to have been misled. . ." The presumption arises from the mere basic fact of the incompatible designations, and is clearly irrebutable and conclusive.

Such a conclusive presumption is inherently suspect pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution.

In Vlandis v. Kline, 412 U.S. 441, 446, 37 L.Ed. 63, 93 S.Ct. 2230 (1973), the United States Supreme Court indicated that "permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments". See also Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, _____L.Ed. 2d _____ (1974); Stanley v. Illinois, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972); U.S. Dept. of Agriculture v. Murry, 413 U.S. 508, _____L.Ed. 2d _____, _____S.Ct. _____ (1973). In Vlandis v. Kline, supra, the Court declared unconstitutional, under the Due Process Clause, a Connecticut statute mandating an irrebutable presumption that a student moving into the state could not establish residence during his or her first year for purposes of qualifying for reduced tuition at a State University. Writing for the Court in Vlandis v. Kline, supra, at 452, Mr. Justice Stewart stated:

> "It is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination."

Just as the Due Process Clause is violated by imposing a conclusive presumption that a student could not qualify for resident tuition in his first year at a State University, the Fourteenth Amendment to the United States Constitution is similarly violated by imposing a conclusive presumption that an individual had intended to engage in election fraud and therefore could not qualify as a candidate merely because he had filed designating petitions for multiple incompatible candidacies. The conclusive presumption does not allow for an individualized determination. See Cleveland Board of Education v. LaFleur, supra. As in Vlandis v. Kline, supra, such an irrebutable presumption is all the more offensive when the state has reasonable alternative means of resolving the problem which it seeks to cure. See supra Argument 1C.

The District Court's finding that there was an implicit finding of fraud is totally unsupported by anything found in the record. (See pages 12-13 of Appendix hereto.)

In sum, the New York Court of Appeals interpreting the

Election Law in Lutfy v. Gangemi, supra, has established a conclusive presumption which is quite similar to those which were constitutionally condemned in Vlandis v. Kline, supra, Stanley v. Illinois, supra and Cleveland Board of Education v. LaFleur, supra. Accordingly, such a conclusive presumption is unconstitutional.

ARGUMENT III

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BOARD OF ELECTIONS DID NOT HAVE TO COMPLY WITH THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, BEFORE INSTITUTING A CHANGE IN PROCEDURE WITH RESPECT TO VOTING DIFFERENT FROM THAT IN FORCE OR EFFECT PRIOR TO NOVEMBER 1, 1964.

The Voting Rights Act of 1965, 42 U.S.C. §1973c, provides that whenever a State or political subdivision enacts or seeks to administer any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting, different from that in force or in effect on November 1, 1964, then such State or political subdivision must either seek a declaratory judgment or a United States Attorney General's opinion that that voting qualification or prerequisite, etc. does not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. 1973c further provides that such determination is a continuing prerequisite to the validity of the new voting qualification or prerequisite, etc.

It is clear that the Voting Rights Act of 1965 is to be given the broadest possible scope and is to reach state enactments which altered the election law of a covered State in even a minor way. Allen v. Board of Elections, 393 U.S. 544,

22 L. Ed. 2d 1, 89 S. Ct. 817 (1969); Perkins v. Matthews, 400 U.S. 379, 27 L. Ed. 2d 476, 91 S. Ct. 431 (1971) (location of polling places was deemed to be a change in the practice and standard and comes within the Voting Rights Act.) The Voting Rights Act of 1965 does apply to New York State (See page 21 of Appendix hereto.)

It is conceded that the Court of Appeals' decision in Lutfy v. Gangemi, supra, changed the law as it stood in New York which permitted a candidate to run for one office if the other incompatible candidacies were eliminated by action of the Board of Elections. (See pages 10, 11 and 48 of Appendix hereto.) ("So much of the holdings in the Ryan & Trongone cases as permitted a single candidacy to survive are not to be followed.") The District Court was in error when it held that the Voting Rights Act was inapplicable because it found no evidence that the new procedure taken by the Appellee Board of Elections mandated by the Court of Appeals had racial overtones.

Judge Mansfield sitting on a three-judge panel in United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D. N.Y. 1971) stated:

> The Supreme Court recently held that where §5 (Voting Rights Act of 1965, 42 U.S.C. 1973 c) is invoked our function is limited to determining whether the challenged law is subject to the provisions of that Act and that if we so conclude the enactment cannot become operative until it has first been approved by one of the two alternative procedures prescribed by §5, regardless of whether we believe that the challenged

provision does not discriminate on the basis of race or color." (Emphasis added.)

Therefore, once it has been determined that there has been a change in the standard practice or procedure of voting, then it was incumbent upon the District Court to enjoin that new standard or practice which the Board of Elections was instituting regardless of whether or not the District Court felt that the change in voting practice had an adverse impact, based upon race or color.

It cannot be doubted that if the action of the Board of Elections was founded upon a new Legislative enactment or internal regulation change, then the provisions of the Voting Rights Act of 1965 would be triggered. Allen v. Board of Elections, supra; Perkins v. Matthews, supra; United Ossining Party v. Hayduk, supra, Appellants submit that the Board of Elections must still comply with the Voting Rights Act of 1965 even though the new procedure or standard is founded upon judicial interpretation. In order to understand why said action does come within the provisions of said Act, it is necessary to understand the legislative history of the Act.

The history of the act demonstrates that, because of the incredible abuse which black persons were suffering at the hands of voting registrars in southern communities, it was

necessary to impose restrictions on actions taken by those registrars, independently or pursuant to a mandate from a higher state body or official "to banish racial discrimination in voting which had infected the electoral process." 1970 U.S. Code Cong. and Adm. News, p. 3278. The Congressional enactment did not differentiate between why and how changes of policy, respecting voting rights, were effected.

Moreover, it is apparent from the legislative history that Congress was concerned about the ability of the judiciary to effectuate the purposes of the Act; and, accordingly, it limited the jurisdiction of the federal courts to the extent that only the United States District Court for the District of Columbia was empowered to validate changes in the voting policies and practices of the states subject to the Voting Rights Act. In that regard, Congressman Richard H. Poff noted that ". . . the measure [limiting the supervision of the United States District Court for the District of Columbia] cannot be justified on grounds other than mistrust of Southern District Judges." 1970, U.S. Code Cong. and Adm. News, p. 3292.

It therefore appears that, by empowering only the United States District Court for the District of Columbia to supervise and pass upon changes in voting policies and practices

within the states coming under the 1965 Voting Rights Act, Congress intended to control policy changes promulgated and/or sanctioned by the judiciary.

The District Court in holding that the Voting Rights Act of 1965 was inapplicable relied on Powell v. Power, 436 F. 2d 84 (2d Cir. 1970). However, Powell v. Power had no applicability whatsoever to 42 U.S.C. 1973c. The plaintiffs in that case asserted that their federal rights were violated because of an inadvertent tallying of ballots which were cast by unauthorized voters. Under that provision which does not deal with a change in voting procedures, regulations, practices, etc., the burden was on plaintiff to either show a wilful error in tabulating the votes of the unauthorized voters or that the error was due to racial discrimination. Since plaintiffs in that case were unable to do either, their complaint was dismissed. It is important to emphasize that Powell v. Power, supra, is totally inapropos in that it did not deal with a change in the practice, procedures, standards, etc. in the voting but merely with an alleged error in the tabulation of the votes.

Therefore, appellants submit that the mandate issued by the New York State Court of Appeals to the Board of Elections herein has the force and effect of changing the voting practices which heretofore existed; and that the Board of Elections can no

more implement those changes without first complying with the provisions of the Voting Rights Act, with judicial approval, than it could independently.

CONCLUSION

In view of the foregoing arguments and the discussion relating thereto, appellants respectfully submit that this Honorable Court reverse the decision and order of the Court below, denying appellants the opportunity to appear on the ballot for the position of Republican State Committeemen.

CERTIFICATE OF SERVICE

David W. Lee certifies that on the 2nd day of October, 1974, I did serve a copy of the foregoing Brief on the appellees by ~~mailing the same first class, postage prepaid~~ personal delivery to their attorneys: J. A. Bonina, 16 Court Street, Brooklyn, New York; Louis J. Lefkowitz, 2 World Trade Center, New York, New York and Corporation Counsel, Municipal Building, New York, New York 10007.

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